

1 **LAW OFFICES OF JOHNNY L. GRIFFIN III**
2 **JOHNNY L. GRIFFIN, III (SBN 118694)**

3 1010 F Street, Suite 200
4 Sacramento, California 95814
5 Telephone: (916) 444-5557
6 Facsimile: (916) 444-5558

7 Attorneys for Defendant
8 UMER HAYAT

9 **LAW OFFICE OF WAZHMA MOJADDIDI**
10 **WAZHMA MOJADDIDI (SBN 226804)**

11 7112 Agora Way
12 El Dorado, CA 95762
13 Telephone: (916) 939-7357
14 Facsimile: (916) 939-2721

15 Attorney for Defendant
16 HAMID HAYAT

17 **UNITED STATES DISTRICT COURT**
18 **EASTERN DISTRICT OF CALIFORNIA**

| | | |
|---------------------------------|---|---------------------------------------|
| 19 THE UNITED STATES OF AMERICA |) | Case No. CR. S-05-0240 GEB |
| |) | |
| 20 Plaintiff, |) | DEFENDANTS' JOINT OPPOSITION |
| |) | TO GOVERNMENT'S MOTION FOR |
| 21 vs. |) | ORDER EXCLUDING TIME UNDER |
| |) | THE SPEEDY TRIAL ACT AND ORDER |
| 22 HAMID HAYAT and |) | VACATING JURY TRIAL DATE |
| 23 UMER HAYAT, |) | |
| |) | Date: July 15, 2005 |
| 24 Defendants. |) | Time: 10:00 a.m. |
| |) | Court: Hon. Garland. E. Burrell, Jr. |
| |) | |

25 The Defendants, by and through their respective undersigned attorneys, hereby jointly files this Opposition to the government's motions for order excluding time under the speedy trial act and for order vacating jury trial. This Opposition is based on the attached memorandum of points and authorities, all papers filed and records in this action, and on such oral

1 argument as may be presented at the hearing on this motion.

2 DATED: July 11, 2005

Respectfully submitted,

3
4 /s/ Johnny L. Griffin, III
5 JOHNNY L. GRIFFIN, III
6 Attorney for Defendant Umer Hayat

7 /s/ Wazhma Mojadiddi
8 WAZHMA MOJADIDDI
9 Attorney for Defendant Hamid Hayat

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I.**

12 **INTRODUCTION**

13 In its motion to “stop the clock,” the government limits its analysis to the provisions of
14 the Speedy Trial Act and completely ignores the proper contours of an accused’s rights to a
15 speedy trial as guaranteed by the Sixth Amendment. Through this Opposition, the defendants
16 will set forth the scope of an accused’s rights to a speedy trial as guaranteed by the Sixth
17 Amendment and codified by the Speedy Trial Act. Though defendants Umer and Hamid Hayat
18 are only charged with making false statements, this case has attracted widespread media
19 coverage based on unsubstantiated and uncharged allegations of terrorist activities.
20 Consequently, the defendants have a particularly powerful interest in guaranteeing themselves
21 the opportunity to expeditiously present their defense, to challenge the contemptible allegations
22 lobbed against them, and to vindicate themselves at trial no later than August 23, 2005.

24 Hence, in addressing this issue, the defendants urge this Court to adopt the approach
25 taken by the Ninth Circuit in *United States v. Murillo*. *United States v. Murillo*, 288 F.3d 1126
(9th Cir. 2002). There the court declared that it was not concerned by the theoretical question

1 whether defendant Murillo’s speedy trial right is statutory or constitutional – it was both. The
2 real question is whether the government illegally deprived defendant of the right to a speedy
3 trial, and if so, whether the delay was prejudicial. *Id.* at 1131-1132.

4 II.

5 STATEMENT OF THE CASE

6 Some time prior to May 30, 2005, for reasons yet unknown to the defense, the
7 government caused Defendant Hamid Hayat to be placed on the “No Fly” List. On May 30,
8 2005, after defendant Hamid Hayat’s original flight from Pakistan to San Francisco was
9 diverted to Tokyo, he was detained and interviewed by the FBI at the airport in Tokyo. Also
10 present at the interview was an Assistant Inspector from the Chiba Prefectural Police. At the
11 conclusion of the interview, federal agents obtained “verbal authority to downgrade” defendant
12 Hamid Hayat from the “No Fly” to the “Selectee” List.”

13 On June 3, 2005, FBI agents contacted and interviewed both defendants at their home in
14 Lodi, California. Defendant Hamid Hayat was requested to submit to a polygraph examination
15 at the FBI office in Sacramento, California. On June 4th, both defendants traveled to the FBI
16 office in Sacramento. Once there, FBI agents interrogated defendants for no less than sixteen
17 hours. Defendant Hamid Hayat was “officially” placed under arrest and booked into the
18 Sacramento County Jail on June 5th at approximately 3:20 a.m. Defendant Umer Hayat was
19 placed under arrest and booked into the jail on June 5th at approximately 8:08 p.m.

20 On June 7, 2005, a Criminal Complaint and Affidavit was filed under seal charging both
21 defendants with one count of 18 U.S.C. § 1001- Making False Statements. Though the
22 Affidavit was in support of a “False Statement” complaint, the affiant chose to include
23 extensive statements concerning terrorism and terrorist activities. Both defendants
24 subsequently were arraigned on the Complaint and ordered detained. The defendants remain
25 detained.

1 On June 16, 2005, the Grand Jury returned a three-count indictment charging Defendant
2 Hamid Hayat with two counts of making false statements, and charging Defendant Umer Hayat
3 with one count of making false statements. On June 21st, the defendants were arraigned on the
4 Indictment and entered “Not Guilty” pleas. The defendants did not waive time and requested a
5 status conference on July 1st before the district court judge to set a trial date.¹

6 On July 1, 2005, defendants requested a jury trial date within the statutory 70-day time
7 period. The government objected to setting a trial date within 70 days, and orally moved the
8 court to declare the case “unusual and complex” and to exclude time under the Speedy Trial
9 Act. The government further advised the Court that it was orally invoking the procedures set
10 forth under the Classified Information Procedures Act (“CIPA”), and requested the Court to set
11 a status conference under Section 2 of CIPA.

12 The Court granted the defendants request and set a jury trial date for August 23, 2005.
13 The Court also set a status conference under Section 2 of CIPA for August 19th. Regarding the
14 government’s request to exclude time under the Speedy Trial Act, the Court set a briefing
15 schedule for the government to present its arguments.

16 III.

17 ARGUMENT

18 A. THE SIXTH AMENDMENT GUARANTEES AN ACCUSED THE RIGHT TO A 19 SPEEDY TRIAL.

20 The guarantee of a speedy trial is one of the most basic rights preserved by the
21 United States Constitution. This guarantee affords the protection to those persons who have
22 been accused in the course of a criminal prosecution. Defendants have both been charged with
23 making false statements to a government official in violation of 18 U.S.C. §1001. The Grand
24 Jury returned its Indictment on June 16, 2005. Under the Speedy Trial Act of 1974, the

25 ¹ On June 24, 2005, various discovery issues were raised and argued before the Magistrate Judge.

1 defendants are entitled to a trial within 70 days of the date of the indictment. 18 U.S.C. § 3161
2 (c)(1). Accordingly, as the government concedes, the defendants are entitled to a trial date no
3 later than August 25, 2005, and the Court was correct in setting the trial for August 23, 2005.

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5 **B. THE GOVERNMENT’S REQUEST TO EXCLUDE TIME AND VACATE THE**
6 **AUGUST 23, 2005 TRIAL DATE DEPRIVES DEFENDANTS OF THEIR SIXTH**
7 **AMENDMENT RIGHT TO A SPEEDY TRIAL.**

8 In its motion, the Government requests the Court to exclude time and vacate the August
9 23, 2005 jury trial date. Granting the government’s requests would deprive defendants of their
10 constitutional right to a speedy trial.

11 In *Barker v. Wingo*, the U.S. Supreme Court held that in determining whether an
12 accused will be deprived of his Sixth Amendment right to a Speedy Trial, the Court should
13 consider and weigh four factors. These factors are: (1) the length of the delay; (2) the reason
14 for the delay; (3) whether the defendant has asserted his right; and (4) prejudice to the
15 defendant from the delay. *Barker v. Wingo*, 407 U.S. 514 (1972).

16 An application of these factors to the case at bar, demonstrates why the government’s
17 requests to exclude time and vacate the trial date must be denied.

18 **1. Length of the Delay.**

19 The government contends that the court should grant a continuance because this case is
20 unusual and complex, and subject to an excludable delay. Under the Speedy Trial Act, the
21 requirement that a trial commence within 70 days may be extended only by the excludable time
22 provisions of 18 U.S.C. §3161(h). Excludable time includes delay resulting from a grant of a
23 continuance. The court should only grant a continuance when it would outweigh the best
24 interests of the public and the defendants in a speedy trial. 18 U.S.C. §3161 (h)(8)(A). Further,
25 to comply with the Speedy Trial Act, the district court must satisfy two requirements whenever

1 it grants such an “ends of justice” continuance: (1) the continuance must be “specifically
2 limited in time;” and (2) it must be “justified [on the record] with reference to the facts as of the
3 time the delay is ordered.” *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997).

4 Though the government requests that time be excluded only from “July 1, 2005 to August
5 19, 2005,” a careful reading of their motion demonstrates that they are really seeking an
6 indefinite exclusion of time. Specifically, the government sets forth a seven-step process it
7 must necessarily follow to fulfill its discovery obligations. Currently, the government
8 acknowledges that it has only “initiated” the first step of this process and cannot “estimate with
9 precision how long” the process will take. The only thing the government can state with any
10 degree of certainty is that the entire process will be “time-consuming.” Consequently, the
11 government cannot establish the first prong of “specifically limited in time” as required by
12 *Lloyd*.

14 **2. The Reason for the Delay.**

15 The Speedy Trial Act provides that no continuance period can be excluded unless the
16 court makes explicit findings that the ends of justice served by granting the continuance
17 outweigh the best interests of the public and the defendants in a speedy trial. 8 U.S.C. §3161
18 (h)(8)(A). The government seeks to justify a continuance by arguing that the case is unusual or
19 complex under U.S.C. §3161 (h)(8)(B)(ii). This provision is applicable only when “the case is
20 so unusual or so complex, due to number of defendants, the nature of the prosecution, or the
21 existence of novel questions of fact or law, that it is unreasonable to expect adequate
22 preparation for pretrial proceedings or for the trial itself within the time limits established by
23 this section.” *Id.* Although complexity of a case is a permissible factor, the mere conclusion
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1 that the case is complex is not sufficient. *United States v. Perez-Reveles* 715 F2d 1348 (9th Cir.
2 1983).

3 Here, the government argues that the nature of the prosecution and the application of
4 CIPA necessarily render this case complex and unusual. The government is incorrect. The true
5 nature of this prosecution does not render the case complex or unusual. A prosecution for
6 violation of 18 U.S.C. § 1001 is not inherently complex. The government is only required to
7 prove three essential elements, namely that:

- 8 (1) The defendant made a false statement in a matter within the jurisdiction of a
9 government agency;
- 10 (2) The defendant acted willfully, that is deliberately and with knowledge that
11 the statement was untrue; and
- 12 (3) The statement was material to the government agency's activities or
13 decisions.

14 Ninth Cir. Model Crim. Jury Inst., 8.66 (2005). The fact that the alleged false statements relate
15 to international and domestic terrorism does not change the essential elements of the offense,
16 nor does it raise unusual factual or legal issues.

17 In an attempt to support its contention that this case is complex and unusual, the
18 government relies heavily on issues relating to its discovery obligations. The fact that the
19 government is overwhelmed by its discovery obligations does not make this case unusual or
20 complex. The government complains that it must collect and review a number of seized items
21 and collect potentially discoverable evidence. The Speedy Trial Act specifically prohibits the
22 granting of a continuance based on a "lack of diligent preparation or failure to obtain available
23 witnesses on the part of the attorney for the government." 18 U.S.C. § 3161 (h)(8)(C).
24 Further, "the lack of diligence by the FBI in processing evidence, and the congested workload
25 of the FBI lab do not constitute a factual basis to exclude time from the Speedy Trial

1 computation in the interests of justice.” *United States v. Dog Taking Gun*, 7 Supp.2d 1118.

2 Moreover, the government has an affirmative constitutional obligation to bring a defendant to
3 trial quickly and to do so with a good faith diligent effort. The right to a prompt inquiry into
4 criminal charges is fundamental and the duty of the charging authority is to provide a prompt
5 trial. *Dickey v. Florida*, 398 U.S. 30, 38 (1970).

6 Here, the government has shown a complete lack of diligence in processing the
7 evidence. Prior to arresting and charging the defendants, the government knew that it would
8 have discovery obligations within a specified timeframe. If the government was not prepared
9 to timely meet its prosecutorial obligations, they should not have arrested and charged the
10 defendants. Moreover, the government seized items from the defendants’ home on June 7,
11 2005 and it now claims that it needs three to four weeks just to review certain evidence.
12 Further, for other evidence seized, the government cannot currently provide an estimate as to
13 how long the review of such evidence will take.²

14 Likewise, the invocation of CIPA does not automatically make this case unusual or
15 complex. The government proffers several cases where the application of CIPA rendered the
16 case complex or unusual. The attempt to draw an analogy between the complexity of this case
17 and those cases involving Noriega and Oliver North is a far reach. CIPA did not render those

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21 ² While the defense commends the government in its desire to be thorough when reviewing the items seized, the
22 defense is particularly concerned with the government’s interpretation and translation of documents seized. For
23 example, the government inaccurately translated and misinterpreted the “scrap of paper” purportedly seized from
24 Defendant Hamid Hayat at the time of his arrest. There are at least two problems with the government’s
25 translation. The most important of which is that the documented version does **not** say “let us be at their throats.” It
literally says “we put you [Allah] at their throats.” Furthermore, the expression “we put you at their throats” does
not, in Arabic, have the bloodcurdling connotation that it has to an English speaker’s ears. It is an idiomatic
expression. A more correct translation would be “we set you before them.” The thrust of the prayer is to put God
as a protector between the one who is praying and his enemy.

1 cases complex or unusual. Instead, the nature of the prosecution and the novel factual and legal
2 issues, independent of CIPA, made those cases complex and unusual.

3 Although the government further argues that there are “legal and factual issues in
4 connection with potentially discoverable classified information,” nowhere in their pleadings do
5 they set forth what these specific “legal and factual issues” may be.

6 In sum, the reasons proffered by the government are insufficient to support an explicit
7 finding of excludable delay. Accordingly, the Court cannot make an explicit finding that if it
8 grants an exclusion of time, the ends of justice will outweigh the best interests of the public and
9 the defendants in a speedy trial.

11 **3. Defendants Asserted Their Right to a Speedy Trial**

12 There is no dispute, and the government concedes, that defendants clearly asserted their
13 right to a speedy trial and requested the Court to set a trial date for August 23, 2005, within the
14 70-day period under the Speedy Trial Act. The Defendants have not caused any delays or
15 requested any continuances and are prepared to proceed to trial on August 23, 2005.

16 **4. Prejudice to the Defendants from Delay.**

17 The final factor in the *Barker* analysis is whether a defendant will suffer prejudice as a
18 result of the delay. No showing of prejudice is required when the delay is great and attributable
19 to the government. *United States v. Shell*, 974 F.2d 1035 (9th Cir. 1992). Also, in some cases,
20 the burden of proving prejudice cannot be placed on the defendant. *Doggett v. United States*,
21 505 U.S. 647.

22 In this case, the government itself suggests an indefinite delay that may result from its
23 “time-consuming” review of evidence. Specifically, on page 14 of its motion, the government
24 states:
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The government will need to review these [classified and unclassified] materials, determine what is discoverable, and file appropriate motions with the court in connection with the materials deemed subject to or potentially subject to discovery.”

This statement confirms that the government anticipates causing a lengthy and indefinite delay. Thus, because the potential delay is great and attributable to the government, the defendants are not required to show actual prejudice. Notwithstanding, defendants are prepared to make the showing of prejudice.

Prejudice to the defendant must be considered in light of the interests the Speedy Trial right was designed to protect: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Barker* at 532.

Applying these factors, there can be no dispute that defendants are facing undue and oppressive pretrial incarceration in this case. Based on the terrorist allegations, the defendants are being specially housed in single cells at the Sacramento County Jail. They are scheduled to leave their respective cells for only one hour daily. There have been many days when, however, for various unexplained reasons, they are not released at all. Further, as Muslims, their special dietary needs are not being met at the jail. In short, though the defendants are only charged with making false statements, their pre-trial incarceration is undue and oppressive.

Likewise, there can be no dispute that the defendants will suffer from “anxiety and concern.” An arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. *Smith v. Hooy*, 393 U.S. 374, 377-378 (1969). The Defendants’

1 custody status, as well as the fact that the government has labeled them as terrorists, has caused
2 extreme anxiety and concern to the defendants, their family and their friends.

3 Finally, a delay will impair the defense for a number of compelling reasons. First the
4 jury pool will be tainted by the widespread and ongoing media attention. Second, there is a
5 likelihood that more sensitive information will leak out into the public. Third, there may be
6 more acts of “true terrorism” (e.g. Bombings in London) that the public may associate with
7 defendants’ case.

8 Accordingly, because of the oppressive pretrial incarceration, the defendants’ anxiety
9 and concern, and the possibility that the defense will be impaired, the defendants have made a
10 sufficient showing of actual prejudice.
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12 **IV.**

13 **CONCLUSION**

14 For the reasons stated above, defendants, Hamid Hayat and Umer Hayat, respectfully
15 request the Court to deny the government’s request to exclude time based on case complexity.
16 The defendants further request the Court to deny the government’s request to vacate the August
17 23, 2005 jury trial date.

18 DATED: July 11, 2005

Respectfully submitted,

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20
21 /s/ Johnny L. Griffin, III
JOHNNY L. GRIFFIN, III
Attorney for Defendant Umer Hayat

22
23 /s/ Wazhma Mojaddidi
WAZHMA MOJADDIDI
Attorney for Defendant Hamid Hayat